



**Labour Party Legal Aid Review:
Briefing Note by Young Legal Aid Lawyers (YLAL)**

November 2015

Lord Bach has been asked by Jeremy Corbyn to carry out a comprehensive review of legal aid for Labour, considering civil, crime, family and social welfare law. Lord Bach will be assisted in this task by Karl Turner MP. The terms of the review are as follows:

1. To set out the principles that should be at the heart of the legal aid system.
2. To develop a legal aid policy that is credible, principled and up to date.
3. To look at the consequences of LASPO and the legal aid cuts.
4. To influence the present government to make changes to their existing policies.

This briefing note is prepared by Young Legal Aid Lawyers (YLAL) prior to the Labour Legal Aid Summit arranged by Lord Bach and Karl Turner on 3 November 2015. In this note, we will address each of the above headings in turn, after a brief introduction to YLAL as an organisation.

Young Legal Aid Lawyers

Young Legal Aid Lawyers (YLAL) was formed in 2005 and has over 2,000 members. We are a group of junior and aspiring lawyers committed to practising in those areas of law, both criminal and civil, which have traditionally been publicly funded. YLAL's members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales. We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law.

1. Setting out the principles that should be at the heart of the legal aid system

The modern legal aid system was introduced by the post-war Labour government through the Legal Advice and Assistance Act 1949. This Act was the result of recommendations made by the Rushcliffe committee, which reported to Parliament in May 1945. The Rushcliffe recommendations included:

- Legal aid should be available in all courts and in such manner as will enable persons in need to have access to the professional help they require;
- This provision should not be limited to those who are normally classed as poor but should include a wider income group;
- Those who cannot afford to pay anything for legal aid should receive this free of cost;
- There should be a scale of contributions for those who can pay something toward costs;
- The cost of the scheme should be borne by the state, but the scheme should not be administered either as a department of state or by local authorities; and

- Barristers and solicitors should receive adequate remuneration for their services.

We agree that these principles should form the basis of the legal aid system. In particular, we believe it is vital that legal aid is available for all categories of case in which important civil rights are at stake. Legal aid should not be limited only to those classed as poor but rather should be available to anyone who is unable to afford to pay for legal advice and representation. Equal access to justice for all irrespective of wealth should be the absolute core principle of our legal aid system. We believe that the cost of legal aid should be met by the state through general taxation. We believe that access to justice is a public good that should be classed by government in the same category as the rights to healthcare and education, which are free at the point of use.

Another recommendation by the Rushcliffe committee was that the legal profession should be responsible for the administration of the legal aid scheme. Indeed the scheme was originally administered by the Law Society until the creation of the Legal Services Commission. The purpose of legal aid should be to ensure equal access to justice for everyone. Whether it is administered by the legal profession or by the state is, in our view, of secondary importance. However, the government has a responsibility to ensure that public funds are spent appropriately. Therefore we believe it is right that the legal aid scheme is operated by a body such as the Legal Aid Agency which, while part of the Ministry of Justice, has operational independence in decision-making on individual cases. The guiding principle should, of course, be the interests of the public, rather than the interests of the legal profession. However, in relation to legal aid, we believe those interests are very often aligned.

Lord Falconer wrote in the foreword to *A Fairer Deal for Legal Aid* that “the legal aid system is one of the proudest legacies of the progressive post-war Labour governments”.¹ Lord Falconer continued:

“Legal aid ensures vulnerable and disadvantaged people are not denied access to justice because of their inability to pay for it. And it ensures that people accused of crime get a proper defence and so a fair hearing. It is one of the cornerstones of a fair and decent society.

Legal aid provides the framework within which citizens can enforce their rights and are held accountable for fulfilling their responsibilities.”

We agree that vulnerable and disadvantaged people should not be denied access to justice because of their inability to pay for it. However, we do not believe that civil legal aid should be reserved only for the very poorest in society, as is increasingly becoming the case. When the civil legal aid scheme came into operation in 1950, it is estimated that 80% of the population had a means-tested entitlement to legal aid.² However, as the eligibility criteria for civil legal aid have been restricted, this figure has fallen significantly, to 40% in 1973 and 29% in 2008.³ It is likely to have fallen further since the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

While it is true that at its inception, legal aid was predominantly used for family and criminal law, we do not believe it is fair that the vast majority of the population should be financially ineligible for any form of publicly-funded legal advice or representation in civil matters. The strictness of the means test for civil legal aid today means that anyone whose ‘disposable’ household income exceeds £733 per month or whose ‘disposable’ capital exceeds £8,000 is automatically ineligible for almost any form of publicly-funded civil legal help. In reality, the result of the current financial eligibility criteria is that almost anyone

¹ *A Fairer Deal for Legal Aid*, Department for Constitutional Affairs, 2005: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272138/6591.pdf

² *The Justice Gap*, Steve Hynes and Jon Robins, p21

³ *Ibid*

who is not in receipt of means-tested state benefits will be financially ineligible for civil legal aid.⁴ In our view this represents a widespread denial of justice to the people of this country.

In criminal legal aid, we believe it is vital that anyone charged with a criminal offence should have access to publicly-funded legal advice and representation, from the police station to trial. While the right to publicly-funded representation is recognised, reform of criminal legal aid contracts and significant fee cuts mean that many criminal firms risk going out of business. It is vital to the legitimacy of the criminal justice system that there is a sufficient number of lawyers with expertise and experience in criminal law to advise and represent defendants. We also believe that practitioners should have a central role in shaping reform of legal aid. Any government should work with representative groups such as the Criminal Law Solicitors' Association (CLSA) and London Criminal Courts Solicitors' Association (LCCSA) in order to ensure an effective and efficient criminal legal aid system.

As the Rushcliffe committee recommended, lawyers carrying out legal aid work should receive adequate remuneration for their services. At present, we do not believe that legal aid lawyers – and in particular criminal lawyers – receive adequate remuneration. Many lawyers who carry out legal aid work are dependent on income from privately-paying clients in order to remain in business. A simple way to ensure that lawyers carrying out publicly-funded work would be to link legal aid hourly rates to the Guideline Hourly Rates set by the Civil Justice Council,⁵ e.g. legal aid rates could be set at 80% of the guideline rates. Alternatively, legal aid rates could be set directly by the courts or by an independent body charged with setting remuneration for legal aid lawyers at a fair level which will protect access to justice.

In conclusion, we believe the principles that should be at the heart of the legal aid system should include:

1. Equal access to justice irrespective of wealth is a constitutional right belonging to each citizen;
2. The right of access to justice applies equally to civil and criminal law;
3. Legal aid should be available for all categories of case in which important rights are at stake;
4. Legal aid should be available to anyone who is unable to afford to pay for legal advice and representation (i.e. not just those normally classed as 'poor');
5. The cost of the legal aid scheme should be borne by the state;
6. Lawyers carrying out legal aid work should receive adequate remuneration for their services;
7. The legal aid system should encourage social mobility and diversity in the legal profession; and
8. The government has a duty of respect for the rule of law, which should be observed at all times.

2. Developing a legal aid policy that is credible, principled and up to date

We believe that Labour should work from the first principles set out above to develop its legal aid policy. This policy should not simply react to and accept the recent cuts to legal aid and how the justice system currently operates, but should consider how best to ensure access to justice for everyone, irrespective of wealth.

We believe that, ultimately, a significant funding commitment is required to develop a credible and principled legal aid policy. Even before the implementation of LASPO, access to justice was severely – and in our view, unfairly – limited by the reduction in the number of people eligible for civil legal aid to

⁴ Legal Aid Agency Keycard 51, issued April 2015:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420971/laa-eligibility-keycard-51.pdf

⁵ http://webarchive.nationalarchives.gov.uk/20110218200720/http://www.hmcourts-service.gov.uk/publications/guidance/scco/previous_rates.htm

29% of the population in 2008. While comparisons in legal aid spending are complicated by the difference between adversarial and inquisitorial systems, in England and Wales the proportion of GDP spent on the justice system as a whole is below the EU average.⁶ In this context, we believe that the legal aid budget from central government should be increased in order to protect and improve access to justice.

We note the findings of the Citizens Advice study in 2010, which estimated that, for every £1 spent on legal aid, the state saves:

- £2.34 from legal aid spent on housing advice;
- £2.98 from legal aid spent on debt advice;
- £8.80 from legal aid spent on benefits advice; and
- £7.13 from legal aid spent on employment advice.⁷

Further evidence of the economic case for funding social welfare legal advice and representation has been provided by a number of studies.⁸ Spending on legal aid should be viewed in this context. Likewise, cuts to legal aid made by the Coalition and Conservative governments are likely to be a false economy which lead to greater knock-on costs elsewhere, for example through delay and increased costs caused by unrepresented litigants, negative effects on health outcomes and in circumstances where early debt or benefits advice can prevent the development of more serious and costly problems, such as homelessness.

We believe that the case for increased spending on legal aid in order to improve access to justice is strong and would command public support. For example, in a poll conducted before the 2015 general election, 84% of respondents rated access to justice as a fundamental right, compared with 82% for healthcare that is free at the point of use.⁹ As stated above, we believe that access to justice is a public good that should be funded by general taxation. We believe that legal aid is the most effective method to ensure access to justice. Civil legal aid should not be limited to only the most serious cases (as it is post-LASPO) or to the poorest in society. Instead, legal aid should be available for cases concerning important rights and subjected to fair tests of the means of the applicant and the merits of their case. Those areas of law removed from the scope of legal aid by LASPO should be reinstated.

We recognise, of course, that no political party or government can credibly make unlimited spending commitments, and that increasing the budget for publicly-funded legal advice and representation is not the only way to improve access to justice. Better use of the internet and IT to provide legal information to the public can reduce the need for face to face legal advice. Technology should be used to support the provision of legal advice and to improve public legal education. The government could work with the Citizens Advice Bureau, Law Centres and other advice services to provide and promote a comprehensive online legal information service.

Any opportunities to connect legal advice services with other complementary public services – for example through provision of advice in GP surgeries – should also be explored. We will support any genuine efforts to make law and the legal system more accessible to the public, but ultimately we believe that the vast majority of prospective litigants will require legal advice and representation in order to realise their rights.

⁶ https://fullfact.org/law/diy_justice_vital_reform_legal_aid-41090 and

http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf#page=57

⁷ *Towards a business case for legal aid, Paper to the Legal Services Research Centre's eight international research conference*, Citizens Advice, 2010: www.citizensadvice.org.uk/towards_a_business_case_for_legal_aid.pdf

⁸ Some of which are cited here:

<http://www.lowcommission.org.uk/dyn/1405934416347/LowCommissionPullout.pdf>

⁹ <http://www.theguardian.com/law/2015/apr/13/justice-concern-free-healthcare-yougov-poll-legal-aid-cuts>

We believe that a core and fundamental component of ensuring access to justice is through the provision of a comprehensive and accessible scheme of legal aid for advice and representation in civil and criminal cases. It should be recognised that such a scheme of legal aid does not just benefit the individual litigants in publicly-funded cases, but benefits society as a whole. As such, it is right that legal aid should be funded by the state.

We do not believe that pro bono work – i.e. charity – can ever be a complete solution to the problem of providing effective access to justice. It is not suggested that doctors, nurses or teachers should work for free in order to improve healthcare or education, so in our view it is not right for pro bono work by commercial lawyers who do not specialise in social welfare law to be proposed as an alternative to legal aid. We do not believe it is acceptable for the government to remove vast areas of law from the scope of legal aid and to expect that the needs of those clients will continue to be met by lawyers working pro bono. It is plainly wrong to think that the needs of those clients fall away when areas are taken out of scope: they do not.

We believe that the Labour review of legal aid policy should also consider the impact on access to justice of the significant increases in court fees – in the civil courts, the employment tribunal and through the criminal courts charge – introduced in recent years. In this regard, we note that both the Ministry of Justice and the Justice Select Committee have recently consulted on proposals for further court fee increases and the impact of previous court fee increases, respectively. In particular, we would urge Labour to consider the conclusions of the Justice Select Committee following its courts and tribunal fees inquiry.

We believe that Labour policy in relation to legal aid should be centred upon a commitment to a constitutional right of access to justice. This is a clear extension to the Article 6 right to a fair trial provided in the European Convention on Human Rights. If the Human Rights Act 1998 (the HRA) is to be repealed, we would hope that Labour would press for any Bill of Rights that may replace the HRA to include at least as strong human rights protection as is afforded by the current regime. This proposed reform may provide an opportunity to strengthen the protection of human rights in domestic law, and in particular to ensure that the right to a fair trial includes the right to legal aid in cases concerning important civil rights, as well as in criminal cases.

We believe it is important that the legal profession reflects the communities that it serves. Social mobility and diversity in the legal profession should be encouraged by the legal aid system and the potential impact of any proposals for reform on social mobility should be carefully considered.

3. Looking at the consequences of LASPO and the legal aid cuts

The significant reduction in the legal aid budget and the decline in the number of legal aid funded cases tells the story: it is clear that justice is being denied to hundreds of thousands – if not millions – of people as a result of LASPO. In addition to this, there is ample evidence available of the effects of LASPO, including:

- The YLAL research on the impact of LASPO on MPs' advice surgeries, which reported a growth in demand for advice in areas affected by LASPO and increased difficulties in referring constituents to advice services¹⁰;
- The Low Commission on the Future of Advice and Legal Support¹¹;

¹⁰ *Nowhere else to turn: one year on*, Young Legal Aid Lawyers, August 2013:

http://www.younglegalaidlawyers.org/sites/default/files/Nowhere%20else%20to%20turn_one%20year%20on.pdf

¹¹ *Tackling the Advice Deficit*: <http://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf>

- The Bar Council report on The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On¹²; and
- The Justice Select Committee report on the Impact of changes to civil legal aid.¹³

We believe there is already significant evidence to demonstrate the injustice that has resulted from LASPO. We would be pleased to work with the Labour Party and anyone concerned about access to justice to improve the evidence base in support of legal aid.

4. To influence the present government to make changes to their existing policies

In terms of influencing the present government to make changes to their existing policies, we would recommend that the review consider the Legal Aid Practitioners Group (LAPG) Manifesto for Legal Aid, published before the 2015 general election.¹⁴ YLAL endorses the recommendations made in the LAPG Manifesto.

We believe that Labour should work with other opposition parties seek to influence the present government in the following specific areas:

Review of LASPO: Labour should continue to press for the review of the impact of LASPO to commence immediately (at present it is scheduled to commence in April 2016 and may last two years). When the review does begin, Labour should support legal aid practitioners in seeking to overturn and ameliorate the negative impact of LASPO on access to justice. In particular, Labour should press for areas of law removed from the scope of legal aid by LASPO to be brought back into scope. We would urge Labour to consult practitioner groups in relation to the specific areas of law to be reinstated. The review should be based on firm evidence that is publicly available. It should consider the impact of cuts from LASPO on vulnerable groups and the consequential costs.

Criminal legal aid: Labour should continue to support criminal lawyers in their dispute with the government concerning the ‘two tier’ contract scheme for criminal legal aid and the cuts to fees, working with practitioners and representative groups to develop a sustainable criminal justice system.

Residence test: Labour should continue and re-assert its unambiguous opposition to the discriminatory and unlawful residence test for civil legal aid.

Domestic violence: Labour should campaign to ensure that victims of domestic violence are able to access legal aid and are not prevented from doing so by overly prescriptive eligibility criteria.

Judicial review: Labour should defend judicial review against reforms that will restrict the ability of citizens and organisations to challenge unlawful state decisions and actions.

Social welfare: Labour should press the government to implement the recommendations of the Low Commission on social welfare advice.

Exceptional funding: Labour should press for radical reform of the exceptional funding scheme for legal aid, following the High Court ruling that the scheme is unlawful.¹⁵ Particular groups, such as children and people with disabilities, should be passported or presumed suitable for exceptional funding. The means through which an applicant can apply for funding should be simplified and lawyers should be remunerated adequately for complex applications.

¹² http://www.barcouncil.org.uk/media/303419/laspo_one_year_on_-_final_report_september_2014_.pdf

¹³ <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31102.htm>

¹⁴ http://lapg.co.uk/wp-content/uploads/2015/03/40163_Manifesto_Final_WEB.pdf

¹⁵ <http://www.bailii.org/ew/cases/EWHC/Admin/2015/1965.html>

Court fees: Labour should oppose increased court fees – including civil fees, employment tribunal fees and the criminal courts charge – unless it can be shown that such increases in fees will not have a negative impact on access to justice or on the fairness of the justice system.

Legal aid rates: Labour should encourage the government to establish an independent organisation to set reasonable fees for civil and criminal legal aid.

The above list is not intended to be exhaustive, but represents what we consider to be the current priorities for legal aid that could feasibly be achieved during this Parliament.

We strongly believe that this review should be guided by the fundamental principle of access to justice for all. We believe that justifies and makes credible the systemic overhaul of the current legal aid system that is urgently required.

Conclusion

YLAL is grateful to Labour for committing to this review of legal aid and for inviting us to contribute. We are very pleased to help any party committed to improving access to justice and we look forward to working with Labour to develop its policy on legal aid.

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